Supreme Court of the United States.

No. 255.

THE CITY OF CLEVELAND,

APPELLANT,

vs.

THE CLEVELAND CITY RAILWAY COMPANY,

APPELLEE.

No. 256.

THE CITY OF CLEVELAND,

APPELLANT,

vs.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,

APPELLEE.

Brief for Appellant.

D. C. WESTENHAVER and
NEWTON D. BAKER,
Counsel for Appellant.

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Brief for Appellant.

These two cases are nearly alike on facts and identical in the questions of law presented for decision. In the Court below they were argued together as one case; the district judge, who rendered the decrees appealed from filed one finding of fact and one opinion in both — for these reasons the appellant asks that they be heard and argued together here.

STATEMENT.

The decrees appealed from were rendered on the 11th day of March, 1901 (No. 255 Record, page 200; No. 256

Record, page 232); the decrees are rendered on the amended bills, answers, and general replications, and declared null and void two separate ordinances of the City of Cleveland as being laws of the State of Ohio impairing contractual obligations between the City of Cleveland and the respective plaintiffs in each suit. They award perpetual injunctions against the enforcement of the ordinances in questions.

In case No. 255 the ordinance so declared to be null and void was passed on the 17th day of October 1898 and is known as the "Hopkins Ordinance." It is set forth in full in the amended bill, Record 255, page 158, and is as follows:

ORDINANCE 22437.

Ordinance No. 22437—An Ordinance to provide for a diminution of the rate of fare under section 7 of an ordinance passed August 25, 1879, entitled "An ordinance granting a renewal of franchise to the Kinsman Street Railroad Company to reconstruct, maintain, and operate its street railroad in and through certain streets of the City of Cleveland."

Whereas, The City Council did, on the 25th day of August, 1879, pass an ordinance entitled "An ordinance granting a renewal of franchise to the Kinsman Street Railroad Company to reconstruct, maintain, and operate its street railroad in and through certain streets of the city of Cleveland," by which ordinance said Kinsman Street Railroad Company, its successors and assigns, were authorized to reconstruct, maintain, and operate its double track street railroad, commencing on Superior street at the intersection of Water street; thence to and around the south-west corner of Monumental Square to Ontario street; thence through Ontario street to and through a portion of Broadway street to Woodland avenue

(formerly Kinsman street); thence through said avenue to Madison avenue, subject to certain conditions and limitations; and

Whereas, is was ordained, as part of those conditions and limitations (section 7), that "said company shall not charge more than five cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the Council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient; and

Whereas, The Council does now deem justifiable and expedient a diminution of the rate of fare, therefore,

Section 1. Be it ordained by the City Council of the city of Cleveland, That the rate of fare for a single continuous passage over the lines and all extensions thereof, operated under the aforesaid grant to the said Kinsman Street Railroad Company, be and is hereby fixed at four (4) cents each fare over the whole or any part thereof.

Sec. 2. For the better accommodation of the public any person, company or corporation operating said line of railway under said grant shall at all times keep on sale, on the cars, when in operation, tickets good for a single continuous passage over said lines and all extensions thereof at the rate of seven tickets for twenty-five cents.

Sec. 3. This ordinance shall take effect and be in force and after its passage and legal publication.

Passed October 17, 1898.

GEO. H. BILLMAN,
President of the Council.

HOWARD H. BURGESS,
City Clerk.

Approved by the Mayor October 20, 1898.

The ordinance referred to therein renewing the franchise of the Kinsman Street Railroad Company is also set forth in full in the amended bill. (Record 255, pages 141 to 145). It grants a renewal for a term of twenty-five years from and after the 20th day of August, 1879, on certain terms and conditions, of the franchises of the company operating that street railroad. This renewal was made in pursuance of legislative authority which will be hereafter cited authorizing the same "upon such conditions as they (the City Council of Cleveland) may consider conducive to the public interests." The conditions contained in the ordinance impose numerous burdens on the railway company, but the one relevant to this controversy is section 7, which is as follows: Record 255, page 143:

> "Sec. 7. Said company shall not charge more than five cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the Council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient."

In case No. 256 the ordinance declared to be null and void was also passed on the 17th day of October 1898 and is known as the "Cope Ordinance." Except as to the necessary variation in recitals in the preambles, it is the same as the "Hopkins Ordinance," and is set forth in full in the amended bill (Record 256, page 197). It recites a renewal grant of the franchise of The East Cleveland Railway Company made on the 15th day of September in the year 1879, made pursuant to the same legislative authority. The ordinance renewing the franchise of the last-named company is found in the record (Record 256, pages 177-181). This ordinance is substantially similar to the ordinance granting the

franchise to The Kinsman Street Railway Company drawn in controversy in Case No. 255 and contains the same terms and conditions. Section 6 of this ordinance is as follows:

> "Sec. 6. Said company shall not charge more than five cents fare each way for one passenger over the whole or any part herein renewed, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient."

The statute law of the State of Ohio by which the power was conferred upon the City of Cleveland to grant original franchises to street railway companies and to renew the same; in fact all the power directly conferred by the legislature on municipal corporations to grant or renew franchises for street railway companies, or to regulate the conduct of the same, or the fares to be charged thereon, are contained in Sections 2501 and 2502 of the Revised Statutes. They are as follows:

> Sec. 2501. (*Terms and conditions of construction and operation to be fixed by council; renewal of grant.*) No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest.
>
> Sec. 2502. (*Proceedings to establish a street railroad route; grant not valid for more than twenty-five years.*) Nothing mentioned in the next preced-

ing section shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon the recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be such, and if not then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property-holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant or renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal, except in cities of the second grade of the second class, in which no grant or renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than fifty years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.

Both of these sections were in force throughout the period during which the several ordinances drawn in controversy in this litigation were passed. Several other sections of the Revised Statutes in reference to the burdens which a municipality may impose, and the terms on which extensions may be permitted, or consolidations of existing companies made, become relevant in the consideration of these cases. They are as follows:

> Sec. 2504. (*Pavement of streets where railroads are constructed; proviso.*) The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders or the Nicholson or other wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders or the Nicholson, or other wooden or asphaltic pavement shall not be required; provided, that in cities of the second grade of the first class, the council may require of any street railroad company to pave and keep in constant repair, sixteen feet for a double track or seven feet for a single track, all of which pavement shall be of the same material as the balance of the street is paved with.
>
> Sec. 2505. (*Council of city or village may grant extension of street railroad.*) The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of section three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hun-

dred and forty-three, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws shall not be increased by reason of such existing tension or consolidation.

Sec. 2505-b. (*Consolidation.*) Wherever the lines or authorized lines of road of any street railroad corporations or companies meet or intersect, or whenever any such line of any street railroad corporation or company, and that of any inclined plane railway or railroad company or corporation, or any railroad operated by electricity or other means of rapid transit may be conveniently connected, to be operated to mutual advantage, such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation; or whenever a line of road of any street railroad company or corporation organized in this state is made, or is in process of construction to the boundary line of the state, or to any point either within or without the state, such corporation or company may consolidate its capital stock with the capital stock of any corporation or company, or corporations or companies in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391 and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections and each of them; and the said sections including these so amended and supplemented, are adopted and made a part of this section.

Sec. 3443. (*Council etc., may fix terms and conditions.*) Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated.

(3443-12.) Sec. 5. (*Consolidation.*) Such street railroad companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation.

It will be noted that the council of any city must consent to the extension of existing lines, but such consent is not required in the event of a consolidation involving no extension of tracks, and in either event the legislature imposes the restriction that there shall be no increase of fare for carrying passengers over the extended or consolidated lines.

The powers of control over the streets given by the legislature to municipalities are contained in Section 2640 of the Revised Statutes, which is as follows:

Sec. 2640. (*Council to have control of streets, etc.*) The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance.

After the enactment of the Hopkins and Cope ordinances on October 17, 1898 the appellees in these two cases, The Cleveland City Railway Company and The Cleveland Electric Railway Company filed their respective bills in equity in the Circuit Court of the United States for the Northern

District of Ohio. As both the complainants were and are citizens of the State of Ohio the jurisdiction of the Circuit Court was based on the assumption that these two ordinances were passed in pursuance of authority delegated by the legislature of the State and were therefore in effect laws of the State of Ohio, and that the rate of fare fixed by these ordinances for the carrying of passengers was unreasonably low and thereby deprived the railway company of property without due process of law in violation of section 1 of the 14th amendment of the Constitution of the United States and also that they impaired the obligation of contracts previously made between the City of Cleveland and these two companies. The facts relied upon to show the contracts which it is contended were impaired will be set forth hereafter more in detail.

Answers were filed to each of these bills and on the hearing of the application for a preliminary injunction many affidavits were read. A preliminary injunction was awarded on the ground that these ordinances impaired the obligation of contracts; the other ground was not passed on by the Court, on the contrary it expressly declined so to do. As already stated, the Court filed the same finding of facts and opinion in both cases.

Afterwards in order to present more clearly and definitely the question decided by the Court in awarding the preliminary injunctions, the plaintiffs below filed the amended bills already referred to, in which the ordinances were pleaded at length which were relied on as creating contracts; answers and replications were filed, and the final decrees made from which these appeals are being prosecuted. There was no evidence submitted at this final hearing. As a result all the proceedings in both cases prior to the respective amended bills are unimportant and irrelevant here except as to the Court's

finding of facts and opinion and these are assigned as the reasons for the final decrees.

In case No. 255 it is admitted that the ordinance of August 25, 1879 in granting the renewal of the franchise of The Kinsman Street Railroad Company and in fixing the conditions upon which it was renewed, reserved or contracted for the right in the city, thereafter to regulate fares; but this right it is contended was subsequently surrendered and new contracts made whereby the city abandoned the rights reserved by it in the ordinance of August 25, 1879; that is, new contracts giving to the railway company the right to charge a fare higher than that fixed in the Hopkins ordinance. These subsequent ordinances, relied upon to support this contention, are set forth in the amended bill, (Record 255. pages 139-169).

The property and franchises of The Kinsman Street Railroad Company were acquired sometime subsequent to August 25, 1879 by The Woodland Avenue Railway Company. This railway was operated on the east side of the Cuyahoga River which separates what is known as the east from the west side of the City of Cleveland.

The West Side Street Railroad Company which was operated on the west side of said River was consolidated in 1885 with The Woodland Avenue Railway Company under the name of The Woodland Avenue and West Side Street Railroad Company. This consolidation was made in pursuance of the statutes already quoted and by operation of law the new company succeeded to all the rights and privileges and became subject to all the liabilities and duties of the constituent companies. The franchise of The West Side Street Railroad Company is also a renewal grant, and was granted by ordinance

passed June 5, 1882. (Record 255, pages 146-147). The appellee asserts and the judge of the Court below finds that this ordinance gave the company the right to charge a cash fare of five cents for each passenger carried, but the fact is that the ordinance is entirely silent on the subject of the rate of fare or the right of the city to regulate the same.

On May 14, 1883 and before the consolidation which formed The Woodland Avenue and West Side Street Railroad Company permission was given by the City Council to The Woodland Avenue Railway Company to extend its line on and along Woodland Avenue to Corwin Street (Record 255, page 148). It is also contended that this ordinance operates as a new contract conferring the right to charge a single fare of five cents over the entire line of which the extension granted by it is a part; that is over the lines covered by the Kinsman Street franchises as well as the extension thereby authorized and in effect if not in express terms cancelled the right of regulation stipulated for in the Kinsman Street franchise of 1879. The provision in the extension ordinance from which this is inferred is contained in the following language:

> "But with the express condition that no increase of fare shall be charged by said company on any part of its main line or on said extension by reason of said extension, so that but one fare shall be charged between the eastern terminus and the western terminus of its main line."

This it will be noted is merely a recital of the provisions of section 2505 of the Revised Statutes in reference to extensions; the consent of the Council could be given upon no other terms.

This was the condition of affairs when the consolidation referred to took place. The authority for the consoli-

dation and the effect of it is contained in sections 2505, 2505-b, 3443 and 3443-12 of the Revised Statutes set forth in full above. Section 3343-12 also provides, "No increase of fare shall be allowed on any street railroad route by reason of such consolidation." Except as appears in section 3443 the statutes delegate no duty to the councils of cities in connection with the consolidation of street railway companies; nevertheless the respective companies addressed a joint communication to the council of the City of Cleveland bearing date February 9, 1885, upon which the council on February 16, 1885 undertook to pass an ordinance consenting to said consolidation. (Record, 255, pages 149-150). In the communication it is said: "They "desire to consolidate said companies so that passengers can "be carried for one fare between any points upon their respec- "tive lines" and that "The companies do not desire any en- "larged rights or any new franchises beyond being permitted "to run their cars from end to end as above indicated and "they will be controlled by all ordinances now controlling "their respective companies." Section 1 of the ordinance assenting to the consolidation says: "That for a single fare "from any point to any point on the line or branches of the "consolidated road no greater charge than five cents shall be "collected and that tickets at the rate of eleven for fifty cents "or twenty-two for one dollar shall at all times be kept for sale "on the cars by conductors." Section 2 says: "Said con- "solidated company shall be subject to all the liabilities, con- "ditions and penalties to which said several companies are "liable, and said consolidated company and its tracks shall at "all times be subject to the control, regulation and supervision "of the City Council to the same extent that the several com- "panies and their tracks are now liable." (Record 255, pages 149-150).

On April 8, 1887, another extension was made upon consent by the City Council to the consolidated company. This consent was given by an ordinance passed April 8, 1887 (Record 255, pages 151-152). It grants permission to lay an additional track on Franklin Avenue between certain points, and to extend its line for a certain distance on Franklin Avenue. Section 1, among other things, says: "But on the express "condition that no increase of fare shall be charged by said "railroad company on any part of its main line, or on said ex- "tension, and so that but one fare, not to exceed five cents "(5c.) shall be charged between any points on said company's "main line or extension, including the extension herein "granted, and said company shall sell tickets on its cars as "follows: 'Eleven (11) tickets for fifty cents (50c.) and "twenty-two (22) for one dollar ($1.00).'"

On August 12, 1887, the City Council by ordinance consented to another extension by the Woodland Avenue and West Side Street Railroad Company. (Record 255, pages 152-153). The extension is from Kentucky street to Waverly Avenue, and thence along Waverly Avenue to connect with its line of railroad on Bridge Street. The ordinance is in the same form and contains the same provisions as to fares as the one last recited.

On June 20, 1892, the City Council by ordinance authorized the Woodland Avenue and West Side Street Railroad Company to lay an additional track in Kinsman Street from Wilson Avenue to the city limits. (Record 255, pages 154-155). This ordinance contains the same provisions as to fares as that contained in the last two ordinances consenting to extensions by the company above recited, and also makes additional conditions with respect to street paving. This last condition the council had a right to impose at any time by vir-

tue of Section 2504 of the Revised Statutes herein set forth, and is not to be taken as a consideration for the privileges conferred upon the companies, although so claimed in the bill of complaint.

On May 15, 1893, this company, The Woodland Avenue and West Side Street Railroad Company, was consolidated with the Cleveland City Cable Railway Company, thereby creating the Cleveland City Railway Company, the plaintiff below, and the appellee in case No. 255.

In this instance also, notwithstanding that the right to consolidate and the terms and conditions of the consolidation were fixed by statute, as set forth above, and notwithstanding the fact that the City Council had no power of control over the same, and its consent was therefore unnecessary, the form was gone through of addressing to it a communication and obtaining an ordinance assenting to the consolidation. (Record 255, pages 157-158.) The communication addressed by the companies to the Council recites the fact of consolidation to take effect June 1, 1893, and says: "It is proposed on June "1, 1893, to immediately issue proper transfers without ex- "tra charge, so that passengers on any line of the Woodland "Avenue and West Side Street Railroad Company may trans- "fer to and have a continuous passage upon any line of the "Cleveland City Cable Railway Company within the limits of "the City of Cleveland, and also so that passengers upon any "line of the Cleveland City Cable Railway Company may be "transferred to, and have a continuous ride upon any line of "the Woodland Avenue and West Side Street Railroad Com- "pany within the City of Cleveland; only one fare to be "charged for such ride, and as soon as the necessary improve- "ments can be made, additional cross-town lines will be run, "and only one fare charged for a continuous ride upon any

"additional lines within the City of Cleveland." The City Council, on May 15, 1893, by resolution received the communication, and said that "this Council approves such consolidation "upon the terms and conditions stated in such communication." From these several ordinances and resolutions passed since August 20, 1879, it is contended that new contracts have been made between the City and the successors of the original Kinsman Street Railway Company whereby the provisions of the original ordinance stipulating for the right to increase or diminish the rate of fare as the Council may deem justifiable and expedient has been abrogated and surrendered and the absolute right to charge a cash fare of five cents (5c.) and to sell tickets at eleven (11) for fifty cents (50c.) conferred upon the company.

A similar state of facts exists in case No. 256, affecting the rights of the City of Cleveland, and the Cleveland Electric Railway Company. The controversy in this case begins with the East Cleveland Railroad Company, and the ordinance of September 15, 1879, renewing its franchise for a term of twenty-five years. One of the terms of this renewal grant is the stipulation already quoted from the Kinsman Street grant, conferring on the City Council the right thereafter to increase or diminish the rate of fare "as it may deem justifiable and ex-"pedient."

Thereafter, on April 4, 1883, an ordinance was passed granting the right to extend, lay and operate a double track from Willson Avenue to Fairmount Street (Record 256, pages 181-182). Provisions are made as to paving and time schedules, which need not be quoted here. Section 4 of the ordinance provides "that the Council reserves to itself the right "hereafter to increase or diminish the rate of fare between "the west end of the said company's lines in Superior Street

"and the city limits, as it may deem justifiable and expedi-"ent." This space covers all the lines authorized by all franchises of the East Cleveland Railway Company to the date of its passage. On March 15, 1886, another ordinance was passed by the Council of the City of Cleveland (Record 256, page 184). This authorizes the construction of a double track on part of the line covered by the preceding ordinances and is an extension thereof, the part in question being between Fairmount Street and the eastern limits of the city. The condition as to street paving is the same in substance as had been imposed by the ordinance last mentioned. Section 4 of this ordinance is as follows:

> Sec. 4. That the rights as herein granted and conferred are upon the express condition, however, that such company shall charge and collect but one fare of not more than five (5) cents for each passenger, one way in either direction, between the easterly limits of the city on Euclid Avenue, and the westerly terminus of said company's tracks at the intersection of Superior and Bank Streets, and upon the further condition that said company shall run their cars over said line between said points last named in each direction as the public convenience, in the opinion of the common council, by resolution expressed, may require.

On July 13, 1888, an ordinance was passed granting permission to change the motive power from animal to electric power (Record 256, pages 186-188). It seems that the legislature of the state has never passed any statute in reference to this kind of change, and acts of the council authorizing the change are matters of regulation in pursuance either of the right reserved in the franchises when originally granted, or by virtue of rights of control over streets as provided in Section 2640, already cited.

Cincinnati and Spring Grove Ave. St. Ry. Co. vs. Incorporated Village of Cumminsville, et al., 14 O. S., 523.

The courts of first instance in Ohio have held that the change from animal or cable to electric motive power is not an additional burden upon a street, and that the City Council may authorize such change by ordinance.

Harrison vs. Mt. Auburn Cable Co., 17 Bulletin, 265;

Pelton vs. East Cleveland Railroad Company, 22 Bulletin, 67;

the latter case being decided with reference to rights of the appellee in case 256. But whatever view may be taken of the nature of such a change, it cannot be held to be either the granting of a new franchise, or the renewal of an existing franchise "at the expiration thereof." This permission to make the change, whatever the basis of the city's power, was conferred by an ordinance in which the only provision touching on the question of fares is as follows:

> "Sec. 6. The privilege of constructing the electric system, and the operation of its lines as hereinbefore provided, is granted in consideration of the improved facilities hereby contemplated, and the large expenditure necessary to secure the same, and shall be in force for a period of twenty-five (25) years from and after the date of the passage of this ordinance upon its main and Cedar Avenue lines; but nothing herein shall be so construed as to authorize any increase of present fares for transportation from any portion of said company's lines. * * * *"

On April 12, 1889, the City Council consented to an extension of the tracks of the East Cleveland Railroad Company along and upon Case and other Avenues, and gave per-

mission to operate the same by electricity. The provision with respect to fares is found Record 256, page 190, and is as follows:

> "Sec. 4. That said permission is granted upon the express condition that no increase of fare shall be charged by said company on any part of its main line, or of said extension, and but one fare, not exceeding five (5) cents or one of said railroad company's tickets shall entitle a passenger to transportation over the main line and extension, from the intersection of Lake and Water Streets to the easterly limits of the city, and from the easterly limits of the city to the intersection of Lake and Water Streets."

The foregoing lines and franchises related to territory on the east side of the City of Cleveland. On the 25th day of March, 1893, the East Cleveland Railway Company was consolidated with the Broadway and Newburgh Street Railway Company, thereby creating the plaintiff below, and appellee in this case, No. 256. Afterwards, on the 24th day of April, 1893, the Brooklyn Street Railroad Company and the South Side Street Railroad Company were also consolidated with the said The Cleveland Electric Railway Company, the same name being retained under the second consolidation. Both of these consolidations were made without the consent of the City Council, as by the statute law of the state was entirely proper. Afterwards, on the 22nd day of May, 1893 (Record, 256, pages 191-192), the Cleveland Electric Railway Company addressed a communication to the Council of the City of Cleveland, not requesting either the consent to or the approval of the previous consolidation, but containing the following statements:

> "These two consolidations were made under advice of counsel, and believed by the officers and stockholders of the respective companies to be legal

and valid in all respects. Inasmuch as some question seems to have arisen as to the intention of the Cleveland Electric Railway Company, the company desires to state to you officially that it does not claim any rights greater than the constituent companies forming the organization; that it intends to obey all ordinances to which each and all of the constituent companies were subject; that it has, since such consolidation has been effected, issued transfer checks to all persons desiring them, to enable such persons to have a continuous ride from any East Side line to any South or West Side line, and from any South or West Side line of the company to any East Side line, for one fare, and will continue such system of transfers where it cannot better accomodate the patrons by such through lines as it may establish; that it disclaims all intention of charging more than one fare for any such continuous ride; that its aim has been, and will be, to give its patrons vastly improved service and accomodations by reason of such consolidation."

On May 29th, 1893, the City Council by resolution consented to the consolidation on the following conditions:

"That only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by any of said constituent companies and any line of any other of the said constituent companies within the limits of the City of Cleveland, and passengers on any of said lines paying one fare shall be entitled, without extra charge, to be transferred to any other of said lines and have one continuous ride thereon for said single fare."

On July 17th, 1893, an ordinance was passed granting permission to The Cleveland Electric Railway Company to extend its street railroad on certain streets, in which provis-

ions are made as to street paving, sprinkling, etc., but the ordinance is silent as to the rates of fare; it does, however, contain the following provision:

> "Nothing in this ordinance shall be held to release said company from any of the conditions of any of the grants heretofore made by the City to any of said constituent companies." (Record 256, pages 193, 196.

So far as the record discloses these are all the subsequent ordinances and from these it is contended that the City Council has lawfully and intentionally abandoned and surrendered the right to increase or diminish the rate of fare reserved to it in the ordinance of September 15, 1879, by which the franchise of The East Cleveland Railway Company was renewed, and substituted in place thereof a binding contract authorizing the present company to exact a cash fare of five cents and tickets sold at the rate of eleven for fifty cents.

The answers filed, in each case, to these amended bills are so nearly alike that a joint statement may be made of their contents.

They deny and put in issue the jurisdiction of the Circuit Court of the United States to take cognizance of this litigation.

They deny the allegations of irreparable injury and while they admit the intention of the city and its officers to enforce the Hopkins and Cope ordinances they deny that the effort so to do necessarily involves a multiplicity of suits, and they therefore question the jurisdiction of the Court of equity to take cognizance of this litigation on the theoiry that the plaintiffs have a remedy at law. They admit all the ordinances and resolutions set out or referred to in the bills of complaint but they do not admit that they constitute a contract right in

the plaintiffs below to charge and collect any given rate of fare or that they annul or modify the provisions of the two original ordinances in question reserving to the city the right to increase or diminish the rates of fare, nor do they admit that all the provisions of the subsequent ordinancess are valid.

These answers particularly insist that the right so to increase or diminish the rate of fare is one of the obligations and liabilities imposed in a renewal of a grant of a franchise; that it is within the powers of the city council to impose such a condition of renewal and is beyond the power of any subsequent council to release during the life of the renewal grant; in other words that the power of subsequent councils is controlled by that part of section 2502 R. S., above, cited, as follows:

> "And after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not during the term of such grant or renewal release the grantee from any obligation or liability imposed by the terms of such grant or the renewal of a grant."

The answers further insist that the words in the clause last quoted "during the term of such grant or renewal" when taken in connection with the words, "the council may renew any such grant at its expiration" found in section 2501 R. S. take it out of the power of the Council, after it has once settled the terms and conditions of a grant or renewal and fixed by grant the length of time during which those terms and conditions shall remain in force, to change the same except as authorized by the legislature, unless the right is reserved in the ordinance itself to change the same, subject, however, to the limitation that the company be not released from any obligation or liability, for this it is incompetent for the council to do.

The answers insist that the provisions of subsequent ordinances, if they are to be construed as in conflict with these statutory provisions, are null and void; that the legislature has made the provision that consenting to extensions shall not authorize an increase of fare and that the recital of this legislative provision in the ordinance cannot be construed as a contract on the subject nor as relieving against a right to fix fares previously stipulated for and to continue in force for twenty-five years. That such a stipulation or obligation it is beyond the power of city councils to release, that in consenting to consolidation the council were without any office or power in the matter of fare regulations and that what they did in that respect is wholly irrelevant and without force or effect.

The answers further insist that the provisions of the subsequent ordinance should not be so construed as to make them attempts on the part of the council to surrender rights reserved to the city, but that on the contrary the language used in these subsequent ordinances contains words of limitation and not of contract, and so far as they affect the franchises under consideration should be construed rather as partial exercises of the right reserved to increase or diminish fare, than as efforts to surrender or release an obligation or a liability imposed upon the company by the prior ordinance, which the council is by express statute prohibited from releasing.

The Court having held with the plaintiff, the City of Cleveland has assigned on these appeals a number of errors. The errors assigned are precisely the same in both cases except that in case No. 255 the fourth assignment incorporates the Hopkins ordinance and in No. 256 it incorporates the Cope ordinance. (Record 255, page 203; Record 256, page 235).

All these errors are relied on with the exception of

those numbered 10, 11, 12 and 13 in the respective assignments of errors. These assignments bear on the reasonableness of the regulation of the rates attempted to be made by the two ordinances in question, which, as we have seen, does not arise in the present state of the record. As these assignments of error present the same questions in many different forms we shall, for the sake of brevity, not repeat them here but instead shall state the legal questions presented thereby for consideration and decision.

1. The Circuit Court of the United States did not have jurisdiction of this litigation, both parties being citizens of the State of Ohio and no Federal question being involved in the controversy.

2. A court of equity did not have jurisdiction of the controversy for any of the reasons assigned in the bills of complaint, in not appearing that the complainants did not have adequate remedy at law, or that there was any danger of irreparable injury or threatened multiplicity of suits.

3. The Circuit Court erred in adjudging that the two ordinances, passed on the 18th day of October, 1898, and known as the Hopkins and Cope ordinances were null and void as being laws of the State of Ohio having the effect of impairing the obligations of contracts between the complainants and the City of Cleveland, and in permanently enjoining the enforcement of those ordinances.

I.

THE CIRCUIT COURT IS WITHOUT JURISDICTION.

Want of jurisdiction in the Circuit Court of the United States is a defect of which this Court will, of its own motion, take notice. This Court will determine this question for itself independent of any concessions or admissions of the parties. It is a fixed and unalterable rule that consent cannot confer jurisdiction when the law does not. Both of the parties litigant are citizens of the same state in each of these cases. The Court, therefore, has jurisdiction only on the theory that the suit is one arising under the Constitution of the United States. The contention of the appellees in the Court below was that the legislature of Ohio had not delegated to the municipal corporations of the state any general power to regulate the rates of fare on street railways; that there was no inherent power in municipal corporations independent of such express delegation of authority to pass ordinances regulating such rates; that such power cannot be inferred from Section 2640 of the Revised Statutes conferring care, supervision and control of all public highways, streets, avenues and alleys on the councils of cities, giving them the power, and imposing upon them the duty to keep such public highways open and in repair, and free from nuisance.

That the power to regulate fares cannot be inferred from the section of the statute last mentioned, is settled by this Court in the case of *St. Louis vs. The Western Union Telegraph Company*, 149 U. S., 465, citing with approval *St. Louis vs. Bell Telephone Company*, 96 Mo., 623. This Court

said, in the case of *St. Louis vs. Western Union Telegraph Company*:

> "The relation of the telephone or telegraph company to its patrons after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporations having such use and its individual patrons; but what the company shall pay to the city for the use is directly involved in the regulation of the use.
>
> The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used, or the size or height of the poles."

Upon this rule of law it was and may be contended that the Hopkins and Cope ordinances are not passed in pursuance of any legislative authority, and are therefore void, even though the enforcement of them would not impair any contracts made between the city and the railway companies. The ordinances do not purport to be passed in pursuance of any delegated authority, but by virtue of the contract right to increase or diminish the rates of fare as may seem just and expedient to the City Council. The foundation of the right to pass the ordinances is one growing out of contract, and is not one delegated by the legislature. These ordinances are not therefore laws of the State of Ohio, in the sense that they have been passed by virtue of authority conferred by the State. This being so, the suit is not one arising under the Constitution of the United States, and the jurisdiction of the Circuit Court cannot be maintained.

This question has been decided by this Court in the case of *Hamilton Gas Light Company vs. Hamilton City*, 146

U. S., 258, a case arising under the laws of the State of Ohio; at page 265, the Court, Mr. Justice Harlan, says:

> "The plaintiff's first contention is that there is no statute of Ohio authorizing any city, in which there are already gas-works in full and complete operation, to erect gas-works, or to levy a tax for that purpose. If this were conceded, we should feel obliged — the plaintiff and defendant both being corporations of Ohio — to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the Circuit Court. The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the State has not, in any form given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligations of contracts. *Murray v. Charleston*, 96 U. S., 432; *Williams v. Bruffy*, 96 U. S., 176, 183; *Lehigh Water Co. v. Easton*, 121 U. S., 388, 392; *N. O. Water Works v. Louisiana Sugar Co.*, 125 U. S., 18, 31, 38. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States. We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas-works of its own, upon that section of the Municipal Code of Ohio, adopted in 1869 (now section 2486 of the Revised Statutes), providing that the city council of any city or village should have power, whenever it was

> deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase gas-works already erected therein; which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the city."

Thus it will be seen that the Court determined that the legislature had conferred power on the City of Hamilton, to do what it was proposing to do, as necessary to be found before it could find that a Federal question was involved. Had it found that the municipal council of Hamilton had not been so empowered it would not have taken jurisdiction of the cause. Whether there is an existing contract to impair is a secondary question and its impairment only becomes a Federal question after the Court finds that the state has delegated power to the municipality, to pass the ordinance or to do the act which it is said would result in its impairment. The test of the question would seem to be whether or not the ordinance would be valid standing alone and independent of a previous contract in conflict with it. If not, then the suit must be fought out in the state courts. The Sections quoted in the statement of facts contain all the statute laws of the State of Ohio either directly or remotely bearing on the question; none of them deal with the right to regulate fares. Section 2501 provides that "a grant may be renewed at its expiration upon such conditions as may be conducive to the public interests." This evidently includes the right to agree upon the rate of fare in making a renewal, and also to stipulate as one of the conditions that the city shall have the right thereafter to increase or diminish the fare. When the renewal is made and accepted, the ordinance of the city exhausts the power delegated by the legislature; the terms and conditions therein agreed upon, between

the city and the company, become a part of the contract between the parties. The scope and extent of the city's power as to regulation of fares is then to be determined by a construction of the language of the contract, entered into between the parties. In this respect the ordinance does not in legal effect differ from a contract between private persons; the fact that one of the parties both in making the contract and in attempting to alter or break it must always speak by ordinance or resolution, does not alter the question of the rights of the parties. The extent of the power and the effect of the alleged subsequent modifications are questions of contract law to be interpreted and construed as are other contracts and by the same forum. That one of the parties to the contract is a municipality and has the right to pass ordinances which in some instances are laws of the state, gives no warrant for the assumption that a Federal question arises whenever the municipality asserts rights reserved to itself by the provision of the original contract.

II.

JURISDICTION OF A COURT OF EQUITY.

The equitable grounds on which jurisdiction is invoked are that the complainants have no adequate remedy at law and that resort to equity is necessary to prevent a multiplicity of suits. The allegations of the plaintiff's bills in this behalf are contained in paragraph 36 in case 256 (Record, page 205), and the allegations of the bill in case No. 255 are precisely the same. In reply to the allegations of the bills that the appellant intends to enforce these ordinances, the answer admits that the city does intend to enforce them according to the true intent and meaning thereof, but denies all the other allega-

tions. There is no proof as to the manner in which the city proposed to attempt the enforcement of the ordinances in question; and that the appellees would not have had an adequate remedy at law, or that they would have been involved in a multiplicity of suits and allegations to this effect, is merely conjecture. The suits should have been delayed until the situation disclosed itself sufficiently to enable a Court to say that a resort to equity and to an injunction were necessary. Both answers contain the following averrment:

> "And defendant avers and contends that this Court has no jurisdiction of this cause among other reasons for this, that the complainant has a complete and adequate remedy at law; that the subject-matter of this cause does not come properly within the jurisdiction of a court of equity and is one appropriately and properly within the jurisdiction of a court of law." (Record 255, page 194; Record 256, page 226).

This position was insisted on in the Court below, and the want of jurisdiction of the subject-matter is assigned here as error. We submit that there was nothing in the cases at the stage when they were instituted to sustain the jurisdiction of a court of equity on these grounds. That such conditions might have developed in the process of enforcing the ordinances may be conceded, but it cannot be assumed that the city would have adopted the methods ascribed to it in the bills of complaint in the absence of evidence on this point, or until the city had taken such action as would not admit of adequate defense at law or necessarily meant a multiplicity of suits; equity ought not to have taken jurisdiction.

This same question was under consideration by this Court in the case of *Detroit vs. Detroit Citizens Street Rail-*

way, 184 U. S., 379 and 381. The Court, Mr. Justice Peckham, delivering the opinion, says:

> "Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a Court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law (and no such objection has been taken at any time, and has not been insisted upon before us,) we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it.
>
> "It is not such a case as on its face equity could have no jurisdiction over, such as an action to recover damages for an assault, or for a libel or slander, but the question between the parties as to the validity of various ordinances and the right of the city to enforce them, involving, as they may, the credit and possibly the solvency of the complainant, and taking into consideration the public interests involved in a speedy and final determination of the question, all these as well as other facts already mentioned, we think, make out a case for following the general rule, that a defense of this nature will not be recognized where it has not been taken by answer or in any other manner, and is not insisted upon on the hearing before the Court. *Reynes v. Dumont*, 130 U. S., 354; *Kilbourn v. Sunderland*, 130 U. S., 505; *Brown v. Lake Superior Iron Co.*, 134 U. S., 530.
>
> "We do not mean to assert that in all cases of this nature, involving simply the validity of a subsequent ordinance or law, a Court of equity would be the proper forum, but confine our decision to the special facts of this case, including the fact that no objection has been taken to the jurisdiction of the Court at any stage of the litigation, and is not now raised by any party to the same."

Thus it will be seen that while the Court in that case took jurisdiction it did so expressly in pursuance of the rule "That a defense of this nature will not be recognized where it has not been taken by answer or in any other manner or is not insisted upon in a hearing before the Court." The defense in this case was taken by answer, was insisted on at the hearing in the Court below and is now insisted on in this Court. And moreover the answer denies all the allegations of the bill imputing to the City of Cleveland an intention to enforce the ordinances in an oppressive manner. This we submit is one of the cases in which a court of equity is not a proper forum.

III.

THE CIRCUIT COURT ERRED IN ADJUDGING THAT THE TWO ORDINANCES KNOWN RESPECTIVELY AS THE HOPKINS AND COPE ORDINANCES, WERE NULL AND VOID, AS BEING LAWS OF THE STATE OF OHIO, HAVING THE EFFECT, IF ENFORCED, OF IMPAIRING THE OBLIGATION OF CONTRACTS BETWEEN THE COMPLAINANTS AND THE CITY OF CLEVELAND, AND IN PERMANENTLY ENJOINING THE ENFORCEMENT OF THE SAME.

In the final decrees, which were passed in these cases, the judge below expressly based them upon the question as to whether the ordinances in question were void as impairing existing contract rights, (Record 255 page 200; Record 256, page 231), expressly declining, in the final decree in case No. 255, to adjudicate the question as to the reasonableness of the proposed regulation, and likewise declining to pass upon the

question as to whether the enforcement of the ordinance would be, as alleged by the complainant, the taking of this property without due process of law. In the decree in case No. 256, the Court does not expressly decline to pass upon these questions, but omits them from consideration and bases the decree upon the impairment of contract rights by the ordinance which the City of Cleveland proposed to enforce.

It thus appears that the sole question decided below was that the Hopkins and Cope ordinances were in conflict with the Constitution of the United States in being laws of the State of Ohio impairing the obligation of contracts. We have seen that unless these ordinances pretend to be passed pursuant to a legislative delegation of authority, this question cannot be raised. It therefore follows that if the complainants are entitled to relief in these actions at all, it must be upon the assumption that the State of Ohio, through its legislature, has conferred upon municipalities somewhere, either by express statutory delegation, or by necessary implication, the right to regulate fares.

Assuming then, for the purpose of argument, that the legislature of Ohio has conferred upon the City of Cleveland the right to regulate fares, we contend that this is a right conferred for the benefit of the public , and one which the Council, as trustees, can neither bargain away nor surrender. The attitude of this Court upon such a power appears in the case of *Owensboro vs. Owensboro Water Company*, 191 U. S., 358, where the Court holds that such a power is a governmental power continuing in its nature, which if it can be bargained away at all, can only be by positive grant, and if any reasonable doubt exists with regard thereto, it must be resolved in favor of the continuing existence of the power.

In *Ruggles vs. Illinois*, 108 U. S., 526, this Court, in considering an amendment to the charter of the railroad company, which provided; "Said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes, and carry into effect the provisions of this act, and for the well-ordering, regulating and securing of the affairs, business and interests of the company; and *provided*, that the same shall not be repugnant to the Constitution and laws of the United States, or repugnant to this act, the Board of Directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time, by their by-laws determine, and to levy and collect the same for the use of said company," held that

> "inasmuch as the power to establish rates was to be exercised through by-laws and the power to make by-laws was restricted to such as should not be repugnant (among other things) to the laws of the State, the amendment did not release the company from restrictions upon the amount of rates contained in general and special statutes of the State."

The second paragraph in the syllabus in the same case states the law with regard to all immunities from legislative or governmental control claimed by grantees of public rights. Its language is:

> "Grants of immunity from legitimate governmental control are never to be presumed unless an exemption is clearly established. The legislature is free to act on all subjects within its general jurisdiction, as the public interests may require."

We are not here discussing the power of the Council of the City of Cleveland as a party to the contract, but as a

governmental agent, basing our argument upon the assumption postulated by the claim of the plaintiffs to the right to relief in this Court, that the Council of the City of Cleveland is attempting to exercise power delegated to it by the legislature of the state. Such a power of regulation is a continuing power of government. It is a duty and a right which the government owes to its citizens and when exercised, the government acts not in its proprietary capacity as a party to the contract, but strictly in its governmental capacity; hence such power, it has been held by this Court, cannot be bargained away at all, certainly not except by words of positive grant, and all reasonable doubts must be resolved in favor of the existence of the power to regulate. See Opinion of Mr. Chief Justice Waite in *Stone vs. Farmers, etc.*, 116 U. S., 307. Nor is the exercise of such a power a trespass upon the rights of the owners of property in *quasi* public corporations. See Opinion of Mr. Justice Barry, in *Ames vs. Union Pacific Railway Company*, 64 Fed. Rep., 165. There is, in fact, an unbroken line of authorities from the leading case of *Munn vs. Illinois*, 94 U. S., 113, down to the last utterance of this Court, indicating that such a right to regulate is a governmental function, and will be preserved unless explicitly contracted away.

As appears from the statutes which we have cited above, councils of cities in Ohio have the right to grant franchises to street railroad companies under certain legislative restrictions. They have the further right to renew any street railroad grant, at its expiration, for a period not in excess of twenty-five (25) years, upon such terms as are considered conducive to the public interests, and they are expressly prohibited from releasing the grantees of such franchises from any obligation or liability imposed by the terms of their original or renewal grants during the time for which such grant

is made. No question has been, or probably can be raised as to the validity of the two ordinances passed in 1879, granting renewals to the Kinsman Street Railroad Company and the East Cleveland Railway Company. They were for twenty-five years, the period permitted by statute, and were within the other statutory restrictions placed around the granting power by the legislature. In no subsequent ordinance permitting extensions of these railways, or the consolidation of them with other railways, is there contained a single explicit statement that the right is given to the grantee company to charge a five (5) cent fare for the transportation of passengers. These various ordinances, as they appear in the bills of complaint, and as their provisions are recited in the statement of facts above, contained here and there the stipulation that no greater rate of fare than five (5) cents shall be charged. This fare provision is the most favorable contained in any of the subsequent ordinances, to the contention of the appellees contained in any of them, while throughout the entire body of extension and consolidation ordinances and resolutions, there are contained numerous statements that the extended or consolidated companies shall be subject to all the liabilities and obligations of the original or constituent companies. Moreover, in the communications addressed to the Council from the companies asking permission to consolidate or explaining consolidations already effected, there is distinct disclaimer of any intention to escape liabilities resting upon the constituent companies, or to secure any enlarged rights.

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A summary statement of the contentions of the appellant in these cases upon this point may be serviceable here. It is claimed that the two ordinances of 1879 are still in force and effect and especially so with regard to those provisions

with respect to the power to regulate fares. In support of this contention it is further claimed,

FIRST, that the reservation to the city of the right to reduce or diminish the rate of fare contained in said ordinances was an obligation and liability imposed by its terms, within the meaning of that section of the Revised Statutes of the State of Ohio which deprives councils of cities of the power to release a grantee from such obligation or liability.

SECOND, that the only ordinances passed by the Council of the City of Cleveland subsequent to the original renewal ordinances of 1879 were ordinances either granting extensions of existing lines, consenting to the consolidations of existing lines or granting the right to change from horse to electric motive power and that in granting any such rights or consents it was incompetent for the Council to surrender the right reserved to it under the renewal franchise ordinance of 1879.

THIRD, that in no one of the ordinances subsequent to the ordinances of 1879 was there anything which expressly surrendered or waived the rights of the city to regulate the rate of fare reserved to it under said ordinances of 1879, nor was there anything in any of said ordinances by which such surrender or waiver can be fairly or reasonably implied.

FOURTH, there is nothing in any ordinance subsequent to the original ordinances of 1879 which is inconsistent with the provisions of those original renewal ordinances.

FIFTH, that any attempt to treat the consents to extensions, consolidations or changes of motive power as renewals of the rights renewed by the ordinances of 1879 must be nuga-

tory in view of the positive provisions of statute above cited, which confer upon municipal councils the power to make such renewals only at the expiration of existing grants.

It therefore follows that if the Court should find that the legislature of Ohio has delegated to municipal councils the power to regulate fares, and without such a finding by the Court the complainants were entitled to no relief below and the Circuit Court had no jurisdiction of their complaints, still the City of Cleveland, not having bargained away this power by express language in any contract with the complaints, but having on the other hand expressly stipulated in the ordinance of 1879 for its reservation and continued existence, and not having by any subsequent ordinances or resolution surrendered or contracted away this right, the right must still exist, and the Court below, having jurisdiction on this theory erred in holding that the attempted exercise of the power was an impairment of any contract right of the complainants.

Conclusion.

Upon these three grounds it is asked that these cases be reversed and remanded, with instructions that the bills of complaint be dismissed, if this Court should find that the Circuit Court was without jurisdiction, and if the Court should find otherwise on the jurisdiction question, for such further proceedings as may be in accordance with the law.

Respectfully submitted,

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